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No. 89-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SUPERIOR ROLL FORMING CO., *et al.*,
Petitioners,

v.

INTERROYAL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a party opposing summary judgment on the ground that there are genuine issues of material fact is excused, in the absence of a local rule or pretrial order, from designating portions of the record with enough specificity so the district court can readily identify the facts upon which the party relies.

2. Whether the district court has the duty under Rule 56, Fed. R. Civ. P., to search the record for substantiation for a party's assertions, in opposition to a motion for summary judgment, that evidence can be found in the record to create issues of fact.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

The parties in the court of appeals were petitioners, Superior Roll Forming Co. and Ralph W. Sponseller, and respondent, InterRoyal Corporation. Superior Roll Forming Co. has no parent, subsidiary or affiliate companies. Ralph W. Sponseller is an individual.

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INTERROYAL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Superior Roll Forming Co. ("Superior") and Ralph W. Sponseller respectfully petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on November 14, 1989.

OPINIONS BELOW

The opinion of the court of appeals is reported at 889 F.2d 108. The order of the United States District Court for the Northern District of Ohio, November 13, 1987, is unreported. These are reproduced as Appendices A and B, respectively, to this petition.

JURISDICTION

The judgment of the court of appeals was entered November 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RULE INVOLVED

This case involves Rule 56 of the Federal Rules of Civil Procedure. The rule is set out in its entirety in Appendix C.

STATEMENT OF THE CASE

Petitioners, Superior and Sponseller, seek review of the lower court's reversal of the district court's entry of summary judgment. The district court entered summary judgment for petitioners (defendants below) against respondent (plaintiff below). It did so because respondent, InterRoyal Corporation ("InterRoyal"), had failed to carry its burden under Rule 56(e) of setting forth specific admissible evidence to show, in opposition to petitioners' motions for summary judgment, that genuine issues of material fact made summary judgment inappropriate. App. B5-6.

The court of appeals reversed. It held that InterRoyal satisfactorily carried its burden by mentioning certain deposition transcripts and documents in which InterRoyal claimed issues of fact could be found. The court held that if the district court had wanted specificity in setting forth facts it should have first advised InterRoyal of that requirement by a pretrial order or local rule. App. A5.

As petitioners will show, the court of appeals' reading of Rule 56(e) conflicts with the text of the rule, with controlling decisions of this Court and with de-

cisions of other courts of appeals. The court arbitrarily shifted from the opposing party to the district court the burden of searching the record to determine whether, in opposition to a properly supported motion, fact issues exist to preclude summary judgment.

By doing so, the court of appeals has imposed an impossible burden on the district court and created the opportunity for the party opposing summary judgment to argue on appeal in every case that the district court missed or overlooked evidence of factual issues buried in the record. The holding compounds the already serious problem of docket control for district courts and casts grave doubt on the continued efficacy of Rule 56 as a tool for disposition of nonmeritorious cases.

A. Facts.

InterRoyal initiated this diversity action against Superior and Sponseller by filing its complaint May 24, 1984. InterRoyal, a manufacturer of metal shelving, alleged that Sponseller, its former national sales manager, had breached his nondisclosure agreement and misappropriated trade secrets of InterRoyal by disclosing them to his new employer, Superior. App. A2. InterRoyal alleged that Superior, which was engaged in the manufacture of metal shelving in competition with InterRoyal, had tortiously induced Sponseller to breach the nondisclosure agreement and had misappropriated InterRoyal trade secrets. App. A2. InterRoyal sought several million dollars in damages.

Following extensive discovery, Superior filed a motion for summary judgment on January 26, 1987. After multiple extensions of time, InterRoyal filed a

brief in opposition on June 1, 1987. App. B2. That brief is reproduced under separate cover as Appendix D to this petition.[1] Sponseller filed a motion for summary judgment on September 2, 1987, relying upon Superior's brief and its supporting record materials and affidavits. InterRoyal opposed it by adopting its June 1 brief. App. B2.

InterRoyal's opposition to the motions for summary judgment was not supported by any affidavits, and InterRoyal did not file any depositions or deposition exhibits in support of its brief. Shortly before filing its brief, it moved the district court for leave to file all of the transcripts and exhibits from the 23 depositions that had been taken in the case. The court granted the motion for leave on June 8, 1987. App. B2. None of the depositions was filed until several months later, on the eve of trial. App. B3, 5n.2.

InterRoyal argued in its brief opposing summary judgment that evidence could be found that would create genuine issues of material fact sufficient to preclude summary judgment. App. D3. It mentioned four deponents by name and referred to telephone records, purchase orders and brochures, without indicating whether they were among the deposition exhibits or could otherwise be found anywhere in the record. App. D5-12, 17, 18.

B. The Lower Court Decisions.

Relying upon *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

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[1] InterRoyal designated the brief as "Confidential" under the district court's protective order of May 30, 1985. Petitioners have reproduced it as a separate appendix to this petition to facilitate compliance with the protective order.

242 (1986), the district court held that Superior and Sponseller had carried their burden of showing entitlement to summary judgment and that InterRoyal's opposition did not satisfy the requirements of Rule 56:

> [I]t is also clear that the mere filing of a memorandum in opposition to a motion for summary judgment is insufficient for the purpose of establishing the existence of a genuine issue of material fact. Just as the moving party is required to make a " 'showing'—that is, pointing out to the District Court—that there is an absence of evidence to support the nonmoving party's case," *Celotex, supra*, at 2554, the nonmoving party must also "designate" the specific facts which show the existence of a genuine issue for trial. *Celotex, supra*, at 2553. The nonmoving party's burden is not met, where, as here, its memorandum in opposition is devoid of references to any specific facts which may or may not be contained in the great bulk of depositions and exhibits which were filed on the eve of trial and more than five months after the filing of plaintiff's opposition. The extent of plaintiff's attempt to point out specific facts which might establish a genuine issue of material fact are a few cryptic references to the entire depositions of Thomas Blazek, Thomas DeBlase of the Binkley Co. and George Arnold and Roger Smith of the Bradbury Co. An attempt to point out a genuine issue of material fact in a "shotgun" approach such as this is not what is contemplated by the

> Supreme Court's pronouncements in *Celotex* and *Anderson*; and in light of these cases, is tantamount of a complete failure to oppose the motion for summary judgment at issue in this case.

App. B4-5 (footnotes omitted).

After securing an appropriate Rule 54(b), Fed. R. Civ. P., certification that an immediate appeal would be in the interests of justice despite the pendency of an unrelated counterclaim by Sponseller, InterRoyal appealed the summary judgment. The appeal was argued April 21, 1989. The court reversed on November 14, 1989.

The court of appeals held that Superior had shown that it was entitled to summary judgment. App. A4. It held, however, that InterRoyal had carried its burden under Rule 56(e) as the nonmoving party and demonstrated that genuine issues of material fact precluded summary judgment. App. A5-6.

The court of appeals observed that a district court is "not required to speculate on which portion of the record the nonmoving party relies", and it also observed that the district court is not "obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim". App. A5. It, likewise, observed that

> designated portions of the record must be presented with enough specificity that the district court can readily identify the facts upon which the nonmoving party relies. . . .

App. A5. The court acknowledged that the district court "was entitled to require more specificity" than

InterRoyal provided in its brief opposing summary judgment. It held, however, that, since the district court had not given advance notice to InterRoyal that it should do more than simply mention the names of deponents and refer to unidentified documents, it was error to grant summary judgment. App. A5-6.

REASONS FOR GRANTING THE WRIT

1. The holding of the court of appeals that a party opposing summary judgment is excused, in the absence of a local rule or pretrial order, from designating evidence with specificity conflicts with controlling decisions of this Court and decisions of other courts of appeals.

Rule 56(e) requires by its terms that a party opposing a motion for summary judgment "set forth specific facts showing that there is a genuine issue for trial". This means that the party must tender "concrete evidence" or "affirmative evidence", *Anderson*, 477 U.S. at 256-57, or, stated differently, "significant probative evidence", *First National Bank v. Cities Service Co.*, 391 U.S. 253, 290 (1968).

Because, as the Court held in *Anderson*, 477 U.S. at 251, the standard for granting summary judgment is the same as that for granting a directed verdict under Rule 50(a), Fed. R. Civ. P., the court evaluating a motion for summary judgment must in every case determine whether the nonmoving party has advanced *admissible evidence* to show that there is a genuine issue of material fact. *E.g., Palucki v. Sears, Roebuck & Co.*, 879 F.2d 1568, 1572 (7th Cir. 1989); *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 189 (D.C. Cir. 1985) (Bork, J., dissenting), *rev'd*, 477 U.S. 317 (1986); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 513 F. Supp. 1100, 1142 (E.D. Pa. 1981),

rev'd, 723 F.2d 238 (3d Cir. 1983), *rev'd*, 475 U.S. 574 (1986).

The court of appeals below impliedly recognized this evidentiary requirement by observing that the party opposing summary judgment must designate portions of the record "with enough specificity that the district court can readily identify the facts" upon which the plaintiff is relying to show that there is a genuine issue for trial. App. A5. Having acknowledged that the nonmoving party must designate facts with this degree of specificity, the court declined, paradoxically, to require any such designation by InterRoyal. Instead, it held that no requirement of specificity could be imposed on a party without first giving notice of it by pretrial order or local rule.

In so holding, the court of appeals relied upon a pre-*Celotex* decision from the First Circuit, *Stepanischen v. Merchants Despatch Transportation Corp.*, 722 F.2d 922 (1983), and certain decisions from other circuits. Of the authorities cited, however, only *Stepanischen* supports the holding. The First Circuit held in *Stepanischen* that, in the absence of a local rule requiring that a party opposing summary judgment cite specifically to evidence in the record, it was not unreasonable to require the district court to search, at a minimum, the entire 600-page deposition transcript of the plaintiff for evidence to support his arguments that there lurked somewhere in the record genuine issues of material fact. *Id.* at 931-32.

Even if *Stepanischen* may have been good law at the time it was decided—a dubious proposition—it nonetheless diametrically conflicts with the Court's later holdings in *Celotex* and *Anderson* that specificity

is required. It likewise conflicts with the holdings of the Seventh Circuit in *Friedel v. City of Madison*, 832 F.2d 965, 969 (1987), the Third Circuit in *Childers v. Joseph*, 842 F.2d 689, 694-95 (1988), the Fifth Circuit in *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300, 1307 (1988), and the D.C. Circuit in *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1034 (1988), that, irrespective of a local rule or pretrial order, Rule 56(e) mandates that a party opposing summary judgment set forth with specificity the record evidence upon which it relies:

> Not only did *this failure to cite to the record* or attachments fail to satisfy the explicit instructions of the district court, it also *failed to satisfy the explicit requirements of Federal Rule of Civil Procedure 56(e)*, which provides, in pertinent part, that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that affiant is competent to testify to the matters stated therein." . . . . Plaintiffs have, with respect to various assertions in its affidavit, failed to satisfy each of these requirements.

Friedel v. City of Madison, 832 F.2d at 969 (emphasis added).

If Rule 56(e) permitted any other response to a properly supported motion than specific designation of record evidence, summary judgment would prove unworkable. A properly supported motion could be defeated by simply asserting that fact issues exist somewhere in the record and then, as InterRoyal did

here, inviting the district court to go search for them. If the asserted issues were not discovered by the district court, the party could obtain reversal merely by arguing to the court of appeals that the district court had not been sufficiently diligent in tunneling through the record and had overlooked evidence identified for the first time by the party in the appellate court.

Rule 56 does not contemplate evidentiary ambush in the court of appeals. *See Childers v. Joseph*, 842 F.2d at 695. It is the party opposing summary judgment who bears, in the trial court, the burden of finding and specifying evidence, and the district court properly held that InterRoyal failed to carry this burden.[2] The burden rests with the party regardless of local rule or pretrial order and does not, contrary to the court of appeals' holding, require a local rule or pretrial order for implementation.

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[2] The district court reviewed, out of an excess of caution, the entire deposition transcripts referred to by InterRoyal and found no evidence of genuine issues of material fact. App. B5 n.3. The court of appeals, relying upon factual arguments in InterRoyal's appellate brief, purported to discover fact issues in the transcripts. App. A6. There is, however, no record support for the three "issues" identified by the court of appeals in reliance upon InterRoyal's brief. In any event, the sufficiency of the district court's review of hundreds of pages of transcript in search of substantiation for counsel's arguments should not even have been before the court of appeals. The review afforded, at most, reinforcement for the decision to grant summary judgment; it did not relieve InterRoyal of its burden under Rule 56(e).

2. The holding of the court of appeals that it is sufficient for a party opposing summary judgment to argue, without citation to the record, that evidence to create an issue of fact can be found by searching the record conflicts with controlling decisions of this Court and other courts of appeals.

The Court considered in *Celotex* the moving party's burden under Rule 56. This case raises a fundamental complementary issue: Does the party opposing a motion for summary judgment satisfy its burden by arguing, without adequate citation to the record, that "facts" can be found somewhere to preclude summary judgment? The answer is obvious. Rule 56(e) imposes no obligation on the district court to search for evidentiary substantiation for asserted "facts".

As already noted above at page 7, it is admissible evidence that the nonmoving party must tender in opposition to a motion for summary judgment. It is not enough simply to argue that "there is some metaphysical doubt as to the material facts". *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Despite the need to produce specific probative evidence, InterRoyal tendered only lawyer's arguments in opposition to the summary judgment motions. These are not evidence. *E.g.*, 10A C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* §2723 at 64-65 (1983).

InterRoyal's brief does not contain even a single reference to an interrogatory response, to a specific deposition exhibit or to a page or section of, or quote from, a deposition transcript. It is pure lawyer's argument, unsupported by any affidavits or any other evidentiary material. The only references of any kind to any record material are mention of the depositions

of two individuals and two corporations, totaling hundreds of pages.

InterRoyal also referred in its brief to telephone records, product brochures and purchase orders, but there was a complete failure to indicate even whether these documents were a part of the record, much less where in the record, if at all, they could be found.

InterRoyal itself never seriously expected the district court to search the record for substantiation for the "facts" in its brief. It did not even file any of the deposition transcripts until months later, on the eve of trial. App. B3, 5n.2.

The court of appeals held, nonetheless, that InterRoyal, by referring to depositions and mentioning documents, had satisfied its burden under Rule 56(e). This, it reasoned, was adequate designation of evidence. The district court was thus obligated, in the court of appeals' view, to search through all of the deposition transcripts mentioned and, presumably, all of the unidentified documentary materials for substantiation for InterRoyal's factual arguments.

By imposing this obligation on the district court, the court of appeals contradicted its own statement in the same opinion that the district court has no obligation to search the record to find issues of fact, a proposition universally acknowledged in post-*Celotex* decisions. *See Street v. J. C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989); *Herman v. City of Chicago*, 870 F.2d 400, 404 (7th Cir. 1989); *Frito-Lay, Inc. v. Willoughby*, 863 F.2d at 1034; *Dunlap v. Transamerica Occidental Life Insurance Co.*, 858

F.2d 629, 632 (11th Cir. 1988); *Nissho-Iwai American Corp. v. Kline*, 845 F.2d at 1307; *Childers v. Joseph*, 842 F.2d at 695; *Friedel v. City of Madison*, 832 F.2d at 969. The court of appeals' opinion is, thus, not only internally inconsistent but squarely in conflict with holdings of other circuits on the district court's duty under Rule 56.

More fundamentally, the court of appeals' holding conflicts with this Court's directive in *Celotex* that Rule 56 should be applied consistently with the purpose of the Federal Rules to secure the just and efficient disposition of cases. Unless, however, a party opposing summary judgment tenders its evidence in such a manner as to permit the district court readily to identify the facts upon which the party is relying and in such a form as to permit the district court to evaluate whether it would be admissible, Rule 56 becomes unworkable.

That is precisely what happened here. InterRoyal totally failed to bring to the district court's attention anything even resembling probative, admissible evidence. By reversing the district court, the court of appeals has effectively amended Rule 56(e) to relieve the party opposing summary judgment of the need to set forth specific admissible evidence and has charged the district court with the duty to search the record itself to rectify the party's failure to do so.

If the court of appeals' extraordinary reading of Rule 56 is allowed to stand, district courts will have no choice but to view Rule 56, contrary to the Court's directive in *Celotex*, 477 U.S. at 327, as a disfavored procedural shortcut. The burden on the district courts in searching the record will prove so onerous that it

can reasonably be expected that virtually all summary judgment motions will be denied, regardless of merit. In those few cases where they are granted, reversal would be certain if, through lack of diligence or otherwise, the district court were to overlook evidence buried in the record.

It would be difficult to conceive of a ruling more destructive of effective use of summary judgment procedures in the district courts, and it is imperative that the Court review and reverse the Sixth Circuit.

CONCLUSION

The Court should issue a writ of certiorari to the Court of Appeals for the Sixth Circuit to review a matter of far-reaching importance in the administration of summary judgment procedures by the district courts.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 88-3903

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

INTERROYAL CORPORATION, a Delaware corporation,
Plaintiff-Appellant,

v.

RALPH H. SPONSELLER, and SUPERIOR ROLL-FORMING COMPANY, INC., an Ohio corporation,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed November 14, 1989

Before: JONES and NORRIS, Circuit Judges; and WOODS, District Judge.*

GEORGE E. WOODS, District Judge. InterRoyal Corporation commenced this lawsuit against a former employee, Ralph Sponseller, and Superior Roll-Forming Company on May 21, 1984, shortly after Superior employed Sponseller

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*The Honorable George E. Woods, United States District Judge for the Eastern District of Michigan, sitting by designation.

as its National Sales Director and began manufacturing True Gauge Shelving, a shelving product that was similar in design to InterRoyal's product. In its complaint, InterRoyal alleged that Sponseller breached his employment contract with InterRoyal by disclosing trade secrets to Superior and that Superior interfered with InterRoyal's contractual relations with Sponseller by obtaining trade secrets from Sponseller while he was still employed by InterRoyal. InterRoyal also claimed that Superior breached a contract with InterRoyal to not duplicate or use the design of InterRivet Shelving, a shelving product Superior had been manufacturing for InterRoyal pursuant to a June 8, 1981, purchase order.

On June 18, 1986, over two years after the commencement of the lawsuit, InterRoyal filed a motion for leave to file an amended complaint, which added claims of breach of fiduciary duty and unfair competition. The district court denied the motion to add claims of breach of fiduciary duty on November 26, 1986, and on January 23, 1987, denied the motion to add claims of unfair competition.

On January 26, 1987, Superior filed its motion for summary judgment. Superior accompanied the motion with a seventy-four page memorandum that contained a seventeen page statement of facts referencing specific portions of depositions and paragraphs of affidavits. Over five months later, InterRoyal filed its memorandum in response to Superior's motion. InterRoyal's response contained a fourteen page rendition of the facts that made only cursory reference to four of the seventeen depositions filed with the court and did not cite specific pages in the depositions or other documents of record to support its factual allegations. Sponseller filed his motion for summary judgment on September 2, 1987. His motion did not recite any facts or assert any legal arguments; it only incorporated Superior's motion by reference.

On November 2, 1987, the district court held a settlement conference that failed to achieve its intended results. At the

close of the conference, the trial judge orally granted the defendants' motions for summary judgment and issued a written version of the order on November 13, 1987. In the district court's written order, the judge indicated that InterRoyal failed to meet its burden of responding to the defendants' motions because "its memorandum in opposition is devoid of references to any specific facts which may or may not be contained in the great bulk of depositions and exhibits which were filed on the eve of trial and more than five months after the filing of plaintiff's opposition." The judge indicated that the depositions to which InterRoyal referred in its memorandum were reviewed in their entirety and failed to raise a genuine issue of material fact.

On November 5, 1987, after the court's oral order, but prior to the written order, InterRoyal filed its own motion for partial summary judgment. The defendants did not respond to this motion and the court did not rule upon it. Instead, the district court entered a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure as to all claims except Sponseller's age discrimination claim. InterRoyal then filed this appeal.

I.

On appeal, InterRoyal asserts that the trial court erred by granting the defendants' motions for summary judgment; by not granting InterRoyal's cross motion for summary judgment; and by denying InterRoyal's motion for leave to amend its complaint.

A.

InterRoyal asserts that the district court erred when it granted summary judgment to Superior and Sponseller because they failed to sustain their burden of establishing the absence of a genuine issue of material fact and, even if they met their initial burden, InterRoyal sustained its corresponding burden by establishing a genuine issue of material fact.

In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Supreme Court held that "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact." *Id.* at 323. The Court did not, however, require the moving party to negate the nonmoving party's claim. *Id.* at 323 ("no express or implied requirement in Rule 56 that the moving party support its motions with affidavits or other materials *negating* the opponent's claim").

In the present case, Superior met its burden. It supported its version of the facts with designated portions of affidavits and deposition transcripts that tended to establish that InterRoyal's claimed trade secrets were not protectible; that it did not interfere with InterRoyal's contractual relations; and that summary judgment was, therefore, proper.

Once the party moving for summary judgment has satisfied its burden, "the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.' " *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)(quoting Fed.R. Civ.P. 56(e)); *Celotex*, 477 U.S. at 324. This "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (quoting Fed.R.Civ.P. 56(e)). InterRoyal contends that it met this burden because it set forth specific facts raising a genuine issue of material fact and supported those facts by filing deposition transcripts and exhibits with the court. Superior disagrees and asserts that the nonmoving party can defeat a properly supported motion for summary judgment only by citing *specific portions*—presumably by page or paragraph number — of depositions, affidavits, and exhibits that raise a genuine issue of material fact.

A district court is not required to speculate on which portion of the record the nonmoving party relies, nor is it obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim. Rule 56 contemplates a limited marshalling of evidence by the nonmoving party sufficient to establishing a genuine issue of material fact for trial. This marshalling of evidence, however, does not require the nonmoving party to "designate" facts by citing specific page numbers. Designate means simply "to point out the location of." *Webster's Third New InterNational Dictionary* (1986).

Of course, the designated portions of the record must be presented with enough specificity that the district court can readily identify the facts upon which the nonmoving party relies; but that need for specificity must be balanced against a party's need to be fairly apprised of how much specificity the district court requires. This notice can be adequately accomplished through a local court rule or a pretrial order. *See e.g., Frito-Lay, Inc. v. Willoughby,* 863 F.2d 1029, 1034 (D.C. Cir. 1988) (local rule); *Stepanischen Merchants Despatch Transportation Corp.,* 722 F.2d 922, 931-32 (lst Cir. 1983) (local rule); *Friedel v. City of Madison,* 832 F.2d 965, 969 (7th Cir. 1988) (pretrial order); *Nilson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec,* 854 F.2d 1538, 1545 (9th Cir. 1988) (local rule).

In the present case, InterRoyal did designate specific portions of the record that raise genuine issues of material fact. It referred to the depositions of Thomas Blazek of Superior Roll-Forming Company, Roger Smith of the Bradbury Company, Stanley Rosko of InterRoyal Corporation, and Thomas DeBlase of the Binkley Company. Moreover, InterRoyal referred to purchase orders, telephone records, and product brochures. The district court was entitled to require more specificity; however, because it failed to notify InterRoyal of that requirement, it erred when it granted Superior's motion

for summary judgment without granting InterRoyal an opportunity to amend its pleadings.

Superior contends that the trial court's error was harmless because a review of the record reveals that summary judgment is still appropriate. There is evidence that raises a reasonable inference that Superior knew Sponseller's employment relationship was governed by a nondisclosure agreement and that Sponseller discussed InterRoyal's confidential information with Superior while still in InterRoyal's employ. This evidence raises genuine issues of material fact as to InterRoyal's claim of tortious interference with contractual relations and its claims of misappropriation of trade secrets. There is also conflicting evidence as to the parties' interpretation of the agreement between InterRoyal and Superior, whereby Superior was authorized to produce shelving to satisfy one of InterRoyal's customers. This raises a genuine issue of material fact as to InterRoyal's claims of contract breaches. Thus, the trial court's error was not harmless, but rather, reversible.

B.

In its motion for summary judgment, Superior asserted that a clause in the June 8, 1981, purchase order, which prohibited Superior from manufacturing shelving similar to shelving it manufactured for InterRoyal, amounted to a restraint on trade. InterRoyal's own motion for summary judgment requested the trial court declare that the contract was not an unlawful restraint of trade. Because the trial court did not grant InterRoyal's motion, InterRoyal appealed this issue. The trial court, however, never rendered a decision granting or denying the motion. Under these circumstances, it is inappropriate for an appellate court to consider the issue because "it was not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

C.

InterRoyal's final argument on appeal is that the trial court abused its discretion when, without stating any reasons for its decision, it denied InterRoyal leave to amend its supplemental complaint with claims of breach of fiduciary duty and unfair competition.

"Federal Rule of Civil Procedure 15(a) provides that generally after a responsive pleading has been served, as it had been in the instant case, 'a party may amend the party's pleading only by leave of court; and leave shall be freely given when justice so requires.' " *Head v. Jellico Housing Authority,* 870 F.2d 1117, 1123 (6th Cir. 1989). "Although this court reviews denials of leave to amend only for abuse of discretion, it should be emphasized that the case law in this Circuit manifests 'liberality in allowing amendments to a complaint.' " *Janikowski v. Bendix Corp.,* 823 F.2d 945, 951 (6th Cir. 1987) (quoting *Moore v. City of Paducah,* 790 F.2d 557, 562 (6th Cir. 1986).

> Several elements may be considered in determining whether to permit an amendment. Undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment are all factors which may affect the decision. Delay by itself is not sufficient reason to deny a motion to amend. Notice and substantial prejudice to the opposing party are critical factors in determining whether an amendment should be granted.

Hageman v. Signal L.P. Gas, Inc., 486 F.2d 479, 484 (6th Cir. 1973) (*quoted in Head v. Jellico Housing Authority,* 870 F.2d at 1123.)

In the present case, the trial judge abused its discretion when it denied InterRoyal leave to amend its complaint.

Although the motion was made after litigation had been proceeding for over two years, the only prejudice raised by Superior was the time and expense involved in redeposing Superior and InterRoyal employees. "The proper remedy for subjecting [a party] to duplicative discovery would be to require the amending party to bear a portion of the additional expense." *Janikowski v. Bendix Corp.*, 823 F.2d at 952.

Moreover, contrary to Superior's assertions, amending the complaint would not be futile. A manufacturer-supplier relationship can rise to the level of fiduciary if the relationship involves the confidential access to trade secrets. *See CPG Products Corp. v. Mego Corp.*, 214 U.S.P.Q. 206, 213 (S.D. Ohio 1981). Thus, InterRoyal's claim of breach of fiduciary duty is colorable. Moreover, the claim of unfair competition is also valid. That count alleged that Superior engaged in unfair competition by copying InterRoyal's load bearing data with regard to InterRoyal's shelving and represented it as the load bearing data of its shelving. These allegations arguably give rise to a claim of unfair competition, which "ordinarily consists of representations by one person, for the purpose of deceiving the public, that his goods are those of another." *Water Management, Inc. v. Stayanchi*, 15 Ohio St. 3d 83, 85, 472 N.E.2d 715, 717 (1984). Accordingly, the trial judge's denial of the motion to amend the complaint was reversible error.

II.

In conclusion, the trial court's grant of summary judgment to the defendants and its denial of the plaintiff's motion to amend its supplemental complaint are REVERSED and the case is hereby REMANDED for further proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. C84-1704

JUDGE ALICE M. BATCHELDER

INTERROYAL CORP.

Plaintiff

v.

RALPH W. SPONSELLER, et al.

Defendants

1987 NOV 13 AM 7:05

CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

ORDER

This matter is before the Court on the motions of defendants Ralph W. Sponseller and Superior Roll-Forming Co., Inc. (Superior) for summary judgment. Upon a thorough review of the motions; the memoranda of the parties; the deposition excerpts, exhibits, and affidavits supplied by Superior and relied on by Sponseller to support their motions for summary judgment, the answers to interrogatories, the admissions on file, and the applicable law, the Court finds that there is no genuine issue as to any material fact and that the moving parties, Superior and Sponseller, are entitled to judgment as a matter of law.

PROCEDURAL HISTORY

Pursuant to this Court's November 19, 1986 Pretrial Order, this matter was originally scheduled for a final pretrial on January 26, 1987, and for trial on February 9, 1987. On December 1, 1986, Superior filed a motion requesting a continuance of the final pretrial and trial dates. on January 26, 1987, the day of the final pretrial, Superior filed its motion for summary judgment, memorandum in support of the motion for summary judgment, and a three volume appendix. As a result of these motions, the Court issued an order on January 27, 1987, which granted plaintiff an extension of time until February 26, 1987, to respond to Superior's motion for summary judgment; scheduled a further and final pretrial and settlement conference for October 13, 1987; and rescheduled the trial for November 2, 1987.

Thereafter, plaintiff requested and was granted an additional extension until May 29, 1987, to respond to Superior's motion for summary judgment. On May 29, 1987, plaintiff filed a motion for leave to file deposition transcripts and exhibits which the Court granted on June 8, 1987; however no transcripts or exhibits were filed at that time. On June 1, 1987, plaintiff ultimately, but without request for leave to file instanter, filed its opposition to Superior's motion for summary judgment. Superior thereafter filed a reply to plaintiff's brief in opposition.

On September 2, 1987, Sponseller filed his motion for summary judgment, which merely incorporated the arguments contained in Superior's motion for summary judgment. On September 10, 1987, plaintiff filed its opposition to Sponseller's motion. This opposition similarly relied on and incorporated plaintiff's arguments contained in its opposition to Superior's motion for summary judgment.

On October 13, 1987, the Court issued an order which stated that the settlement conference, which had previously been scheduled for October 13, 1987, had been re-

scheduled for November 2, 1987; that the trial was scheduled to commence on November 3, 1987; and that all trial materials were to be filed by October 23, 1987. On October 23, 1987, the parties filed twenty-one depositions (some of which occupied several volumes), eight bound volumes of trial and deposition exhibits, their trial briefs, and proposed jury instructions and interrogatories. Thereafter, on October 28, 1987, Superior filed supplemental trial exhibits, two volumes of deposition exhibits; and plaintiff filed two volumes of deposition exhibits.

SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56(c), summary judgment is proper ". . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Thus, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case. . . ." *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552-53 (1986).

"[A] party seeking summary judgment always bears the initial burden of informing the district court of the basis for its motion and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex, supra* at 2553. Once the moving party makes such a showing, the burden of production shifts to the nonmoving party. The nonmoving party must then ". . . go beyond the pleadings and by affidavits or by 'depositions, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial.' " *Potters Medical Center v. City*

Hospital Association, 800 F.2d 568, 572 (6th Cir. 1986), *citing Celotex, supra* at 2553. *See also Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2509-12 (1986).

Prior to these recent Supreme Court decisions, the Sixth Circuit had consistently held that Rule 56(c) required that a district court review the entire record before deciding whether to render a decision on the merits. *Smith v. Hudson*, 600 F.2d 60, 64 (6th Cir. 1979). "A party is never required to respond to a motion for summary judgment in order to prevail since the burden of establishing the nonexistence of a material factual dispute always rests with the movant." *Id.* (citations omitted). Thus, even where a plaintiff failed to file a timely brief in opposition to a motion for summary judgment, ". . . the District Court could not use that as a reason for granting summary judgment without first examining all the materials properly before it under Rule 56(c)." *Id.*

The Supreme Court's recent decisions in *Celotex* and *Anderson, supra*, have altered this standard in two respects. First, although the moving party still bears the burden of establishing the nonexistence of a material fact, once the moving party satisfies that burden, the burden shifts to the nonmoving party to show the existence of a genuine issue of material fact. Thus, there is no longer any requirement that the district court review all Rule 56(c) materials in an attempt to unearth a genuine issue of material fact.[1] Second, it is also clear that the mere filing of a memorandum in opposition to a motion for summary judgment is insufficient for the purpose of establishing the existence of a genuine issue of material fact.

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[1] "But we do not think . . . [that *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)] . . . should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof." *Celotex, supra* at 2554.

Just as the moving party is required to make a " 'showing'—that is, pointing out to the District Court—that there is an absence of evidence to support the nonmoving party's case," *Celotex, supra* at 2554, the nonmoving party must also "designate" the specific facts which show the existence of a genuine issue for trial. *Celotex, supra* at 2553. The nonmoving party's burden is not met, where, as here, its memorandum in opposition is devoid of references to any specific facts which may or may not be contained in the great bulk of depositions and exhibits which were filed on the eve of trial and more than five months after the filing of plaintiff's opposition.[2] The extent of plaintiff's attempt to point out specific facts which might establish a genuine issue of material fact are a few cryptic references to the entire depositions of Thomas Blazek, Thomas DeBlase of the Binkley Co. and George Arnold and Roger Smith of the Bradbury Co.[3] An attempt to point out a genuine issue of material fact in a "shotgun" approach such as this is not what is contemplated by the Supreme Court's pronouncements in *Celotex* and *Anderson*; and in light of these cases, is tantamount to a complete failure to oppose the motions for summary judgment at issue in this case.

It clearly appears from the defendant Superior Roll's motion and supporting documentation and from the depositions referred to by plaintiff that there is no genuine issue as to any material fact and that defendants Superior Roll and Sponseller are entitled to judgment as a matter

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[2] Although the depositions were not filed until October 23, 1987, all of them had been taken at various times in 1986, with the exception of three depositions taken by plaintiff in March, 1987. Therefore, plaintiff had ample opportunity to incorporate the specific facts, if any, from these depositions into its opposition.

[3] The Court has reviewed these depositions in their entirety and finds that they fail to establish the existence of any genuine issues of material fact.

of law. Therefore, the motions for summary judgment filed on behalf of Superior and Sponseller are hereby granted.

The only aspect of this case which remains to be resolved is Sponseller's counterclaim against plaintiff. Therefore, pursuant to Fed. R. Civ. P. 54(b), the Court hereby directs the entry of judgment with respect to plaintiff's claim against defendants and finds that there is "no just reason for delay" of an appeal in this matter.

IT IS SO ORDERED.

Dated this 13th day of November, 1987.

/s/ Alice M. Batchelder
ALICE M. BATCHELDER
UNITED STATES DISTRICT JUDGE

APPENDIX C

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability along although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith contro-

verted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the

affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.